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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HUGUETTE NICOLE YOUNG, Defendant and Appellant.	A132461, A133222, A133856 (City & County of San Francisco Super. Ct. No. 214812)

Defendant Huguette Nicole Young appeals from a judgment convicting her of two counts of depriving a lawful custodian of the right to child custody. She contends that instructional errors by the trial court interfered with her ability to present a statutory defense based on a reasonable and good faith belief that her children were in immediate danger. In a supplemental brief, defendant argues that she received ineffective assistance of counsel based on her attorney's failure to object to the improper instructions. Defendant also argues that the court erred in failing to award presentence conduct credits, that the court violated Penal Code section 654[1] by imposing concurrent one year jail terms as a condition of her probation, and that under section 136.2 the court lacked authority to issue a protective order as a condition of probation.

We find no error with regard to the jury instructions and reject defendant's claim of ineffective assistance of counsel. Defendant's contention under section 654 is similarly without merit because the jail terms were imposed as a condition of probation and are not

[1] All statutory references are to the Penal Code unless otherwise noted.

considered punishment for purposes of section 654. The protective order was properly issued as a condition of probation under section 1203.1, and despite an apparent clerical error was not issued under section 136.2. It is undisputed that defendant was entitled to an additional 73 days of custody credits and we shall modify the judgment to reflect the additional credits.

Factual and Procedural History

Defendant was charged by information with two felony counts of depriving a lawful custodian of the right to child custody (Pen. Code, § 278.5, subd. (a)). The following evidence was presented at trial:

Defendant and complaining witness Dykes Young were married in 2000. Together they had two children. The couple divorced in 2004.

Under a custody order issued in January 2010, defendant and Dykes shared joint legal and physical custody of the children. Dykes was then living in San Francisco and defendant was living in Albany. The children were attending school in San Francisco and alternating weeks living at each parent's home. On January 5, 2011, defendant made a motion in the family court to change the children's school to one closer to her home in Albany. The motion was denied without prejudice and a future hearing date was set to consider the children's schooling more thoroughly.

On January 11, 2011, when Dykes learned that the children were not at school, he filed an ex parte motion in the family court to require the children to stay with him on weeknights. The ex parte motion was heard on January 13, 2011, without defendant being present. The court ordered that the children stay with Dykes on Sunday through Thursday nights and on alternating weekends. The children would be with defendant only every other weekend.

On the evening of Friday, January 14, 2011, Dykes went to defendant's house in Albany and served the custody order. Under the terms of the order, it was his weekend for custody of the children. At Dykes's request, police officers were also present for "civil standby." Defendant refused to permit the children to leave with Dykes as required

by the ex parte order, and Dykes left without them. Later that night, Dykes drove by defendant's home to check on the children.

After serving defendant with the new custody order, Dykes had contacted Officer Darci Mix, with the San Francisco County District Attorney's Child Abduction Unit, and provided her with information regarding the children, defendant, and the new custody order. Officer Mix emailed defendant, introducing herself and attaching a copy of the order. Defendant questioned the authenticity of the order, but Mix, after confirming the authenticity of the order with the court, informed defendant that the order was properly issued.

Defendant responded by email that she did not plan to take the children outside of Albany unless she felt they were not safe from their father, in which case she would move the children to a different location and inform her of that location, pursuant to section 278.7.[2] On the phone, defendant told Mix that she was concerned for the children's safety because Dykes believed in spanking as a correctional tool. Defendant cited an incident in 2006 in which Dykes had spanked one or both of the children. Mix told defendant she believed that defendant's concerns about spanking were insufficient to comply with section 278.7.

That weekend, when Dykes attempted to arrange by email for the transfer of the children, defendant responded, "Be aware that calling me and lurking in the East Bay represents a threat to the kids, as far as I'm concerned, as well as a threat to me. And I may now and at any time before I hear from Darci Mix leave with the children to another location at any time without letting you know."

On January 18, 2011, when Mix learned that the children were not in school that day and that defendant's car was not at her apartment, she began searching for defendant and initiated the arrest warrant process.

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[2] As explained in detail below, section 278.5 prohibits maliciously depriving a lawful custodian of child custody rights and section 278.7 provides an exception based on a reasonable and good-faith belief that the children would suffer immediate physical or emotional harm if left with that custodian.

Dykes was concerned that defendant had left the Bay Area with the children. He explained that in 2006 she had taken the children to Los Angeles in violation of a court order. Because he was concerned that she might have done so again, he set up a tracking device that would tell him when and from where defendant opened any emails he sent her. Dykes subsequently received an email from defendant stating that if he would agree to resume 50/50 custody of the children, she would return with them. He received a notification from the tracking device that defendant was 80 percent likely to be viewing his emails from a location in Nashville, Tennessee. He forwarded the notification to Mix, who identified the physical address and forwarded that information to the Nashville police. Defendant was arrested in Nashville on January 21, 2011.

A tape recording of Mix's interrogation of defendant in the San Francisco County Jail was played for the jury.

The jury found defendant guilty of both counts. The trial court suspended imposition of sentence and placed defendant on three years' probation, conditioned on one year in county jail, with credit for 134 actual days served in presentence custody. The court also conditioned probation on the issuance of a criminal protective order to stay away from defendant's two children. Defendant filed timely notice of appeal.[3]

On July 29, 2011, the trial court granted defendant an additional 20 days of credit for her actual days spent in presentence custody, for a total of 154 days. The court also terminated the criminal protective order of June 22 and issued a new order imposing essentially the same requirements but permitting the family court to modify the stay-away provision. Defendant filed a new, timely notice of appeal from the orders of July 29, 2011.

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[3] Defendant filed three notices of appeal from the same judgment. On June 22, 2011, defendant filed a notice of appeal from the judgment that was not on the standard Judicial Council form. Two days later, her court appointed attorney filed a notice of appeal from the judgment on her behalf. On June 29, defendant submitted a third notice appeal with a letter explaining that there was some confusion regarding the process and that she hoped the final notice would be sufficient.

On September 9, 2011, defendant filed a motion in the trial court to correct her presentence custody credits to include credit under section 4019. The motion was denied and thereafter, defendant timely filed an additional notice of appeal. Pursuant to defendant's motion, this court consolidated her three appeals.

Discussion

1. *Defendant was properly convicted of two felony counts under section 278.5.*

Section 278.5, subdivision (a) provides that whoever "takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation . . . " commits a crime that may be either a misdemeanor or a felony. Section 278.7, subdivision (a), however, provides that section 278.5 does not apply to a person who has a right to custody of the child and acts "with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm . . . ." This exception applies only if the person "within a reasonable time from the taking, . . . make(s) a report to the office of the district attorney of the county where the child resided before the action" and "within a reasonable time from the taking . . . commence(s) a custody proceeding in a court of competent jurisdiction." (§ 278.7, subds. (c)(1), (c)(2).) Under section 278.7, subdivision (d), "a reasonable time within which to make a report to the district attorney's office is at least 10 days and a reasonable time to commence a custody proceeding is at least 30 days. This section shall not preclude a person from making a report to the district attorney's office or commencing a custody proceeding earlier than those specified times." While the prosecution bears the burden of proof under section 278.5, "defendant bears the burden of raising a reasonable doubt regarding whether section 278.7(a) applies." (*People v. Neidinger* (2006) 40 Cal.4th 67, 70.)

The jury was instructed as follows: "The defendant is charged with depriving someone else of the right to custody or visitation in violation of Penal Code section 278.5. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant took, kept, withheld, or concealed a child; [¶] 2. The child was under the age of 18; [¶] AND [¶] 3. When the defendant acted, she maliciously deprived a

lawful custodian of his right to custody or deprived a person of a lawful right to visitation. [¶] Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, defraud, annoy, or injure someone else. [¶] . . .[¶] The defendant can be guilty of child abduction whether or not the child resisted or objected, and even if the child consented to go with the defendant. [¶] Visitation means the time ordered by a court granting someone access to the child." (CALCRIM No. 1251.) The jury was further instructed: "The defendant did not maliciously deprive a lawful custodian of a right to custody or person of a right to visitation if the defendant: [¶] 1. Had a right to custody of the child when she abducted the child; [¶] 2. Had a good faith and reasonable belief when abducting the child that the child would suffer immediate bodily injury or emotional harm if left with the other person; [¶] 3. Made a report to the district attorney's office in the county where the child lived within a reasonable time after the abduction; [¶] 4. Began a custody proceeding in an appropriate court within a reasonable time after the abduction; [¶] AND 5. Informed the district attorney's office of any change of address or telephone number for herself and the child. [¶] . . . [¶] A reasonable time within which to make a report to the district attorney's office is at least 10 days from when the defendant took the child. [¶] A reasonable time to begin a custody proceeding is at least 30 days from the time the defendant took the child. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant maliciously deprived a lawful custodian of a right to custody or person of a right to visitation. If the People have not met this burden, you must find the defendant not guilty of the crimes charged." (CALCRIM No. 1252.)

Defendant contends the court erred in including the reporting requirements in the jury instruction because they were both irrelevant and ambiguous. The instructions were irrelevant, she suggests, because defendant was arrested only four days after abducting the children. The instructions were ambiguous, she argues, because the instructions were unclear as to whether the reporting requirements were triggered only after 10 or 30 days had passed or whether she had up to 10 or 30 days to make the required reports. Defendant writes, "Did the jury understand Ms. Young to have a maximum of 10 days to

report the address of her safe location and the other requisite information to the district attorney, or a minimum of 10 days?" Although we agree that the reporting requirements might have been omitted from the standard instructions because they were not applicable under the facts of this case, neither party requested the court to delete those portions of the CALCRIM instruction. Moreover, their inclusion gave rise to no prejudice. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237 ["An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words."].) There was no question that defendant had the children in her custody on the occasion in question for only four days, such that the time within which reports were required had not elapsed, whether 10 and 30 days were minimum or maximum time periods. During closing arguments neither counsel suggested that the statutory defense did not or could not apply because defendant had not reported to the district attorney or presented the issue to the family court for determination. Such a suggestion, at odds with common sense, apparently did not occur to anyone during the course of the trial and there is no reason to believe that the jury would have understood the instructions in that manner. The evidence was overwhelming and undisputed that defendant abducted the children at least in part for the purpose of obtaining leverage over Dykes in the custody dispute. The fact that she was willing to return the children if the 50/50 custody order was reinstated stands in direct conflict with any potential finding that she had a good faith, reasonable belief that Dykes posed an immediate threat to the children.

Defendant also argues that the court erred in failing to instruct the jury that if it found that she had mixed motives for taking the children, one of which qualified for the section 278.7 defense, the jury was required to acquit. Defendant argues that the jury should have been instructed that "so long as a legitimate reason for taking the children was a 'substantial factor' in her decision to leave with the kids – more than a remote or trivial factor – the jury was required to find her not guilty." Defendant acknowledges that there is no published authority addressing mixed motives in the context of sections 278.5 and 278.7. Instead, defendant attempts to analogize the malicious intent required under

section 278.5 to the specific intent requirement in certain hate crime statutes. In *In re M.S.* (1995) 10 Cal.4th 698, 716, the court held that when multiple concurrent motives exist in a prosecution under section 422.6, which requires that the defendant specifically intend to deprive the victim of protected rights "because of" the victim's protected characteristic, the prosecutor must prove and the jury must find that the defendant's improper motive was a substantial factor in defendant's conduct. By analogy, defendant argues, under section 278.7, "[she] had to show that her lawful intent was a substantial factor in her decision to leave Albany with the children. She is not required to show that it was her only motivation."Assuming this to be true, the failure to so state in the instruction lessened the defendant's burden to establish the defense. As the instructions read, defendant was required to show only that she had a good faith and reasonable belief that the child would suffer harm if left with the other custodian, whether or not there were other motives for the abduction and regardless of the extent to which that good faith belief was a causative factor in the abduction. Inserting that the belief had to be a substantial factor would only have increased defendant's burden.[4]

Finally, defendant contends that the court erred by instructing the jury, over her objection, with CALCRIM No. 372, as follows: "If the defendant fled immediately after the crime was committed, that conduct may show that she was aware of her guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." On appeal, defendant reiterates the objection made by her trial counsel that the instruction

[4] Defendant also argues that her attorney provided ineffective assistance in failing to request the deletion of the reporting requirements from the instruction concerning the good faith defense and in failing to request a pinpoint instruction stating that the defense applies even if there was more than one motive for the abduction. There is no need to consider whether these failures constituted ineffective assistance because, for the reasons stated above, neither was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 694, 697 ["a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."].)

was inapplicable because "[t]here cannot be enhanced culpability attributed to her actions as flight. The offense is flight. And I don't think you can view her flight as anything other than a commission of the offense, not an admission with respect to culpability." The trial court, however, disagreed, explaining that "[f]light is not required and does not have to be part of the deprivation of custody or visitation." We agree with the trial court. The evidence establishes that defendant deprived Dykes of custody throughout the weekend when she refused to turn the children over as required by the valid court order. Her flight, while amounting to further deprivation, supports an inference of consciousness of guilt.

2. *The conditions of defendant's probation were properly imposed*.

As noted above, the trial court suspended imposition of sentence and placed defendant on probation, conditioned on one year in county jail. The court's order notes under the terms and conditions of probation that "The sentences in counts 1 and 2 are concurrent." Defendant claims the trial court violated the dual-punishment prohibition of section 654 when it imposed jail-term sentences for both of her convictions. The Attorney General suggests that concurrent sentencing was appropriate because defendant "had separate criminal objectives, one for each child, warranting punishment for each conviction." We need not resolve this issue, however, because there is no sentence or "punishment" to be stayed. The trial court suspended imposition of sentence on both convictions, granting instead a period of formal probation that was conditioned on, among other things, defendant serving time in county jail. A grant of probation is an act of rehabilitative clemency and its proper conditions are not subject to the dual punishment proscription of section 654. (*People v. Stender* (1975) 47 Cal.App.3d 413, 425, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 240.) Should defendant's probation be revoked and the court ultimately find it necessary to impose sentence, defendant may raise an objection based on section 654 at that time. (See *People v. Wittig* (1984) 158 Cal.App.3d 124, 137.)

Defendant also objects to the protective order issued by the court on July 29. At the June 22 hearing, the court indicated that it was imposing the stay away order as a condition of defendant's probation. On July 29, the court terminated the June 22 order

and issued a new protective order, which was identical to the first except that it gave the family court discretion to modify the protective order. On both orders the court checked the box on the standard JCC CR-161 form indicating that it was a "Probation Condition Order (Pen. Code, § 136.2)."

On appeal, defendant argues the court lacked authority to issue the order because section 136.2 authorizes a protective order only during the pendency of the criminal proceedings.[5] Defendant relies on *People v. Selga* (2008) 162 Cal.App.4th 113, 118-119 in which the court held a protective order may not be issued under section 136.2 as a condition of probation. The court explained that "[b]ecause the only purpose of orders under section 136.2 'is to protect victims and witnesses in connection with the criminal proceeding in which the restraining order is issued in order to allow participation without fear of reprisal,' the duration of such an order 'is limited by the purposes it seeks to accomplish in the criminal proceeding.' [Citation.] That is, the protective orders issued under section 136.2 were operative only during the pendency of the criminal proceedings and as prejudgment orders." (*Ibid*; but see *People v. Stone* (2004) 123 Cal.App.4th 153, 159 ["[a]lthough section 136.2 does not indicate on its face that the restraining orders it authorizes are limited to the pendency of the criminal action in which they are issued or *to probation conditions*, it is properly so construed" (italics added)].) However, we need not decide whether section 136.2 authorized the protective order in this case. Although the box checked by the court indicated that the statutory authority for the order was section 136.2, the record as a whole indicates that the court imposed the order as a

[5] Section 136.2, subdivision (a) provides in relevant part that, "upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, a court with jurisdiction over a criminal matter may issue orders including, but not limited to, the following: [¶] . . . [¶] (4) An order that a person described in this section shall have no communication whatsoever with a specified witness or any victim, except through an attorney under reasonable restrictions that the court may impose."

condition of probation and the condition is undoubtedly proper under section 1203.1.[6]

"Section 1203.1 gives trial courts broad discretion to impose conditions of probation to foster rehabilitation of the defendant, protect the public and the victim, and ensure that justice is done. [Citations.] 'A condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality. . . ." [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.' [Citation.] As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances. [Citation.]" (*People v. Jungers* (2005) 127 Cal.App.4th 698, 702.) There is no doubt that the stay away order issued in this case is reasonably designed to prevent defendant from abducting the children again. Contrary to defendant's argument, the order does not infringe on her "constitutionally protected parental rights." As defendant acknowledges, the July 29 order specifically includes a provision that authorizes the family court to supersede the criminal protective order.

In striking the stay away order issued under section 136.2 in *Selga*, the court acknowledged that the trial court had broad discretion to impose a stay away order as a reasonable condition of probation under section 1203.1, but rejected the People's argument that "since the condition could have been imposed under section 1203.1, there is no prejudice." (*People v. Selga, supra,*162 Cal.App.4th at pp. 119-120.) The court explained, "The criminal protective order itself advises that a violation of the restraining

[6] Section 1203.1, subdivision (j) permits the court to "impose and require . . . reasonable conditions [of probation], as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer. . . ."

order may be punished as a contempt of court, a misdemeanor or a felony. By contrast, for conduct that is not otherwise criminal . . . a stay-away order imposed as a condition of probation is not punishable as a separate offense. " (*Id*. at p. 120.) Accordingly, the court felt compelled to strike the protective order and remand the matter to the trial court "to exercise its discretion on whether to impose a similar stay-away order as a condition of probation under section 1203.1." (*Id*. at p. 121.)

Unlike the situation in *Selga*, the trial court here did not mistakenly issue the protective order under section 136.2. As noted above, when the court imposed the protective order it admonished defendant that the protective order was being imposed as a condition of her probation and that if she violated the order her probation could be revoked. The court repeated this admonition at the conclusion of the July 29 hearing. When the court orally imposed the protective order, it never cited section 136.2, or any other statute, but instead made clear that the order was being imposed as a condition of defendant's probation. It is entirely possible that the court or court clerk checked the box to indicate the protective order was a condition of probation under section 136.2 because that is the only option for a probation order condition on the standard form. There is no box to check to issue the order under section 1203.1 on the standard JCC form. Accordingly, we conclude that the order was properly issued under section 1203.1.

Defendant argues that the July 29 order should be reversed because she could be subject to a separate criminal prosecution if she violates the protective order, based on a prosecuting agency's mistaken belief that the order was validly issued under section 136.2. The present opinion should preclude such a misunderstanding. Nonetheless, to ensure no such mistake occurs, the record should be corrected to reflect that the protective order issued by the court on July 29 was imposed as a condition of defendant's probation under section 1203.1.

Finally, defendant contends that the court erred in failing to award her presentence conduct credits under section 4019. The Attorney General concedes error but argues that the issue is moot since defendant has completed her county jail time and the matter of custody credits can be addressed, if necessary, should defendant violate her probation.

However, since it is undisputed that defendant is entitled to an additional 76 days of credit, we see no reason not to modify the judgment as this time.

Disposition

The judgment is modified to award a total of 230 days presentence custody credits and is affirmed as so modified. The matter is remanded to the superior court to correct the record in accordance with this opinion, to reflect that the protective order issued by the court on July 29 was imposed as a condition of defendant's probation under section 1203.1 and to reflect the additional custody credits.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Siggins, J.